17849

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,
Plaintiffs,
vs.
R.J. REYNOLDS TOBACCO
COMPANY, et al.,
Defendants.
_____/

Miami-Dade County Courthouse
Miami, Florida
Thursday, 9:00 a.m.
December 17, 1998

TRIAL - VOLUME 161

The above-styled cause came on for trial before the Honorable Robert Paul Kaye, Circuit Judge, pursuant to notice.

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17850

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On behalf of Defendants Liggett Group
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SHOOK HARDY & BACON
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On behalf of Defendant Brown & Williamson
JAMES T. NEWSOM, ESQ.

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On behalf of Defendant Lorillard
DEBEVOISE & PLIMPTON
ANNE COHEN, ESQ.
JOSEPH R. MOODHE, ESQ.
On behalf of Defendant The Council for Tobacco Research

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17851

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On behalf of Defendants Liggett Group and Brooke Group

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17852

I N D E X

WITNESS PAGE
ERIC J. SOLBERG
Voir Dire by Mr. Rosenblatt.....17868
FREDDY HOMBURGER, M.D.
Videotaped Deposition.....17916

E X H I B I T S

PLAINTIFFS' EXHIBITS	OFFERED PAGE	ADMITTED PAGE	FOR ID PAGE
None			

E X H I B I T S

DEFENDANTS' EXHIBITS	OFFERED PAGE	ADMITTED PAGE	FOR ID PAGE
None			

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17853

(Whereupon, the following proceedings were had:)

THE COURT: Good morning, all.
MR. ROSENBLATT: Good morning, Judge.
THE COURT: Well, okay. Let's do what we have to do.

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(Discussion off the record.)
THE COURT: So what can we do?
MR. ROSENBLATT: Well, we're discussing whether you're going to permit Harris Solberg to testify.
THE COURT: Okay.
MR. HEIM: We ought to excuse the witness.
THE COURT: Is he here?
MR. HEIM: Yes.
THE COURT: Dr. Solberg.
(Dr. Solberg exited the courtroom.)
THE COURT: See, the problem that I have with this, as we discussed earlier, was the repetitiousness and the duplicative nature of his testimony, since we've heard from three -- even if you cut it down to two other folks who were talking about advertising, youth advertising, and at least we went through a whole litany on sports advertising.
Now, if he's got something new, other than by the numbers of organizations, the numbers of sporting

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events, I mean, something new and different that hasn't been testified about, let me know.
MR. ROSENBLATT: It would be our intention, Judge, that Mr. Solberg's testimony would be very narrow, and he's going to testify in two areas where there's been zero testimony.
THE COURT: Which is?
MR. ROSENBLATT: Number one would be the relationship between the American Medical Association and the tobacco industry over the years. That's something that he has studied. And he's very familiar with the ads in the Journal of the American Medical Association and essentially the relationship between those two organizations.
Within recent years, the AMA has done what it should have done, you know, many, many years ago, but for many, many years, historically, they were working hand in glove with the tobacco industry, and that's what he's prepared to testify to.
Also, the other area of his testimony is

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21 going to be the adequacy of the tobacco advertisements
22 and the failure to warn prior to January 1, 1970. So
23 there's no preemption issue.
24 And he can address the advertisements from
25 the 1940s, 1950s, 1960s, to show that not only were

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17855
1 there no warnings, but there were fraudulent health
2 claims.
3 Obviously, many of the class members started
4 smoking in the '40s, '50s and '60s, and anything and
5 everything we would say as to those advertisements and
6 the time of their addiction and the time they were
7 subjected to the ads would be relevant and admissible
8 and not subject to any preemption argument.
9 And he's clearly a tobacco historian. He's
10 an expert on Florida media and advertising, as well as
11 national media and advertising.
12 Mr. Solberg was the coordinator of community
13 health programs in tobacco control for the north -- for
14 the North Dakota State Department of Health.
15 And we can go through his CV, and the area
16 he's an expert in, and he has his degree in,
17 kinesiology, no one else is from that.
18 Those are going to be the two areas. The
19 advertising prior to January 1st, 1970, that will be
20 one area of his testimony.
21 The second area of his testimony will be the
22 relationship between the American Medical Association
23 and the tobacco industry, CTR, Council for Tobacco
24 Research, money that the American Medical Association
25 has received over the years from the tobacco industry.

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17856
1 And that has not been touched upon. I won't
2 ask him any questions about, in view of what Your Honor
3 said, about sports promotion and those areas.

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MR. HEIM: May it please the Court. Good morning, Your Honor.
Your Honor, this is, of course, the first time that I would have heard or the Court would have heard that Mr. Solberg would be offering testimony about the relationship between the American Medical Association and the tobacco industry over the years.
It is not the subject of his expert witness disclosure, as Your Honor reviewed it yesterday.
THE COURT: That's what I was looking for today.
MR. HEIM: Unless I have forgotten that part of it, but I don't recall it as having been the subject of his disclosure.
THE COURT: Oh, what happened to that?
MR. HEIM: I might have one. Here is one, Judge.
THE COURT: Let me just take a quick look at it.
What is kinesiology? Anybody know what that is?
MR. HEIM: It's the study of how the body

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moves. It's like how your elbow goes up and down.
THE COURT: That's what I thought.
What does it have to do with smoking?
MR. HEIM: I don't have a clue, Judge.
THE COURT: Neither do I.
Okay. In addition to the above, on the second page in the last paragraph, he's expected to testify concerning his knowledge of tobacco industry internal documents, with specific examples of tobacco industry efforts in the area of marketing to children, which we talked about earlier, including but not limited to videotape examples of such marketing activities.
He's then expected to testify concerning tobacco industry's efforts to mislead the public and their leaders concerning whether tobacco is addictive.
That might in some regard tie into what Mr. Rosenblatt just said: whether the industry

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uses
sports marketing and promotion to circumvent broadcast.
We talked about that.
And whether the industry uses its marketing,
promotional and/or public relations efforts to cast
doubt on what the industry itself knows to be true,
that also might tie in --
MR. HEIM: That also is plainly a statement

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of something that's as preempted as you can possibly
get.
THE COURT: Not necessarily. Prior to 1970.
MR. HEIM: I'm going to turn to that in a
second because he delineated two areas that he said he
wanted this witness to testify about. One is the
relationship between the American Medical Association,
the tobacco industry, over the years. Entirely apart
from -- I don't believe that that is fairly disclosed
in his disclosure and that we had any inkling that that
would be the subject of Mr. Solberg's testimony.
I don't know what it's relevant to, either,
the relationship between the American Medical
Association and the tobacco industry over the years.
What does that have to do with plaintiffs' claims?
What does that have to do with Dr. Engle's claim in
this case?
I'm stretching to try to figure out what it
might have to do with Dr. Engle's claim that he was
addicted and got ill.
But, in any event, it's pretty tangential and
I believe not fairly disclosed, and I don't know what
it has to -- really, what it has much to do with
anything, the relationship --
THE COURT: I assume it goes to the fraud

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count.

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MR. HEIM: But in what way? Fraud on Dr. Engle?
THE COURT: Well, fraud on everybody, including Dr. Engle.
MR. HEIM: Well --
THE COURT: I mean, assuming -- I mean, I don't know what he's going to testify to. I don't know anything about it.
But let's assume that the man is going to testify about a relationship between the American Medical Association and the tobacco industry and the things that maybe the tobacco industry and the AMA talked about and resolved or didn't resolve or whatever it might be, and the information given to the AMA by tobacco. That information in turn would be relayed to a patient through the doctors, through the AMA, and if information got to the patient which was not correct information, supplied by tobacco to the doctors, to the patients, that could substantiate something.
MR. HEIM: That's a pretty interesting theory, putting preemption aside for a minute, whether it was intended to undercut the warnings in any way after 1970.
But putting that aside for a minute, it's

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really hard for me to see, Judge, how this witness, who has a Master's degree in kinesiology, who is working on his Ph.D in kinesiology, who is not a medical doctor either, has the expertise and the qualifications, under Frye, to talk about the relationship between the American Medical Association and the tobacco industry.
I mean, what he is -- I think Your Honor remembers a concern the Court had with Dr. Blum, who is a medical doctor, testifying not as an activist, not as somebody who is an advocate, an antismoking advocate, which he has a perfect right to be, but as an expert.
And we did have some problems with Dr. Blum in that

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regard.
Well, this gentleman, Mr. Solberg, is the executive director of the same organization that Dr. Blum comes from. So he is Dr. Blum's right-hand man, or was at least in that regard.
He has no expertise to come in and talk about this subject whatsoever. And to suddenly kind of convert him to talk about a subject that he has no expertise on and is not really disclosed in his expert witness disclosure, and to take us entirely by surprise with regard to this testimony, I think is unfair and improper.
For whatever its relevance might be, this is

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not the witness to come in and talk about the American Medical Association's relationship with the -- so-called relationship with the tobacco industry. So that would be my first point.
It's not disclosed, and he has no qualifications to do it.
My second -- and as to advertisements prior to July 1st, 1969, there are no advertisements prior to 1969 in any of his reliance documents, that they gave us, that would be the testimony he'd be -- the proffered reliance documents. There aren't any ads prior to 1969.
And Dr. Cummings already did ads, I think, going back before 1969. We put them up on the screen here. So he's cumulative of Dr. Cummings.
I mean, the fact is, on this whole area of advertising and promotion, which is intended to get the jury to think there's something wrong with advertising and promotion, we started out with Dr. Cummings. We were told it was going to be Dr. Cummings and either Dr. Arnett or Dr. Blum. We got Dr. Blum. Then we got told: Well, it's true we had Cummings and Dr. Blum, but we needed to have Dr. Arnett, because he had a little bit of a different slant on things because

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he
25 was a behavioral psychologist. So we got
Cummings,

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17862
1 Arnett and Blum. And now we have Solberg, who is
kind
2 of re-Blum.
3 And these areas, the second one has been
4 covered, and the first one is really a surprise
area,
5 that is, to try to get him on the witness stand to
say
6 certain things that he has no qualifications to
say and
7 which are plainly just last-minute, you know:
Let's
8 put him on and have him say these things without
the
9 defendants knowing that that's what he was going
to
10 testify about.
11 Now, I don't think that's fair, and I
think
12 it's way cumulative and prejudicial to put this
witness
13 on. He simply doesn't have the qualifications to
14 testify in this area. He's not the person who
15 collected the advertising. Dr. Blum is the one
who
16 said he's the one who collected all this
advertising
17 over the years.
18 He's the kind of guy who keeps it all
down at
19 the -- whatever they have, their archives in
Texas.
20 And he has authored a bunch of articles, but
they're
21 all co-authored with Dr. Blum. Not all, but most
of
22 them are co-authored with Dr. Blum.
23 So both of these areas, one has been
covered,
24 and the other, Your Honor shouldn't let a
kinesiologist
25 get on the witness stand to talk about the
relationship

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17863
1 between the American Medical Association and the
2 tobacco industry. We probably could learn a lot
from
3 him about how our elbows work and other things
like
4 that, but it's not his area of expertise.
5 THE COURT: Well, maybe not his formal
area
6 of expertise. Some people do change careers in

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midstream.
MR. HEIM: That's true.
THE COURT: As we all know.
MR. HEIM: That's true.
THE COURT: I really don't know anything about the man. Maybe we could take this time, while the jury is in there, to find out a little bit about him, to find out exactly what it is that he professes to know.
MR. MOSS: Judge, there is one other thing, and I think Mr. Heim has touched on it, and I think it's important, and what I suggest we have here this morning is I guess, for lack of a better -- plain and simply, a bait and switch here.
If you look at the disclosure of this witness and the deposition that was taken of him and the reliance documents provided, none of what is now being suggested this morning, none of this was suggested on Friday or on Tuesday when we were here. All of a

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sudden, it's the relationship between the tobacco companies and the American Heart Association.
MR. HEIM: Medical Association.
MR. MOSS: AMA. I'm sorry.
That was not in the disclosure, it was not in the deposition; it was not in the reliance documents.
Mr. Heim has already told you the pre-1970 ads are not there. And you did have pre-1970 ads touched upon here over our objection by Dr. Petty. He came in with his collection.
So, Judge -- and the other part of it is really getting into this fraud in the air or fraud in the market, which we know cannot be -- does not exist in Florida and does not exist anywhere.
We have a witness who simply ought not testify here, Your Honor.
MR. MOODHE: Your Honor, if I could ad just one thing, as well.
The idea that he would come in and testify about the AMA's relationship to the tobacco industry is not a matter of an opinion; it's a matter of fact.

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22 They either gave the money; they didn't give the money.
23 They cooperated, they did certain things; they didn't
24 do certain things. That's not expertise; it's a matter
25 of fact.

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17865

1 This gentleman is not even an M.D., and,
2 therefore, is not even a member of the AMA. How could
3 he possibly give testimony in this area, other than as
4 a matter of hearsay? It has no foundation.
5 Secondly, with respect to the notion that he
6 would come in and testify about CTR, this man has no
7 knowledge about CTR. The only thing he mentioned in
8 his deposition was he was familiar with the
9 organization because at some time, when he was at the
10 North Dakota Department of Public Health, I believe it
11 was, he became familiar it existed, but he said: I
12 never studied anything about the grant program.
13 And as Mr. Moss said, the reliance documents
14 that were identified for his testimony have nothing do
15 with CTR.
16 What I think is happening here is
17 Mr. Rosenblatt knows he's entirely cumulative of
18 Dr. Blum, and he's finding some little nitch to
19 squirrel this testimony in and then use that as a wedge
20 to let a whole lot of other stuff come in. And I don't
21 think that's proper.
22 THE COURT: Okay. You've heard the
23 opposition. What do you say about all of that?
24 MR. ROSENBLATT: You know, Judge, they took
25 Mr. Solberg's deposition twice, for over 600 pages. He

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17866

1 talked about everything in the world. This was covered
2 in his deposition. There was discussions about the
3 American Medical Association. That came up during the
4 deposition.
5 The archives that he -- he is, in a sense, a

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factual witness, talking about documents that he has studied, which causes him to know how does one know about the relationship between the American Medical Association and CTR and tobacco companies. If you're not there, you learn about it from reading. And he's got the best source -- they have the best archives, the best documents of anyone in the country. And he's collected plenty of these documents himself.

And Mr. Heim, you know, tries to belittle his specialty. He's been, since 1990, the executive director of Doctors Ought to Care, this organization that Dr. Blum had testified about.

And you know, they talked preemption, preemption, preemption. I bring in someone, okay, he'll talk about pre-1970, and they've got another argument to prevent him from talking about an area where preemption obviously would not apply.

THE COURT: Well, the problem is I don't know the relationship between the AMA and tobacco or how one talks about it or discusses it or studies it. I have

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no idea how that goes. Maybe I can find out from him before we get into this thing.

As far as pre-1969, say, on advertising, they've raised the issue that nothing has ever been said about that concerning his testimony.

MR. ROSENBLATT: Well, whether we talk about advertising and promotion, we didn't divide it up. Obviously, in the disclosure, when we're talking he's going to talk about advertising and promotion, this is a historical process.

So I come in here and I say he's not going to talk about advertising and promotion from 1970, up until today. He's going to talk about -- all I've done is narrow.

THE COURT: What about the documentary disclosure?

MR. ROSENBLATT: He's not going to use documents. He's not going to use documents. He's going to -- because we know what we go through when we have a witness, you know, using documents. He's

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going
to testify based on his knowledge, for the last ten
years, being with these documents and having a super
familiarity with them.
THE COURT: Why don't we bring him in, and
we'll do a voir dire of him, so I am a little bit more

17868

familiar with who he is, what he is, what he knows and
what he'll testify about. And we'll see where we go
from there.
(The witness entered the courtroom.)
THE COURT: Come up here, sir, and have a
seat, please.
Swear him in.
Thereupon:
ERIC J. SOLBERG
having been called as a witness, was duly sworn,
examined, and testified as follows:
VOIR DIRE EXAMINATION
BY MR. ROSENBLATT:
Q. Okay. Mr. Solberg, tell the Court, please,
your full name and your present address.
A. Eric J. Solberg, John middle name, [DELETED]
[DELETED].
Q. Okay. I'm going to try to go through this
rather quickly and get to a bottom line.
In terms of your educational background, you
received your undergraduate degree in exercise
physiology?
A. That's correct.
Q. What is that?
A. Exercise physiology is the study of, really,

17869

reactions of the human body to exercise stimuli.
Q. Okay. Now, you received your Master's degree
from the University of Minnesota in kinesiology, with
the emphasis on sports management and marketing.
Explain to the Court what kinesiology is.
A. Kinesiology --
THE COURT: We don't need to get into that
area.
MR. ROSENBLATT: Okay.

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THE COURT: I'm more interested in exactly what we're going to talk about here today.

MR. ROSENBLATT: Okay.

BY MR. ROSENBLATT:

Q. An area that I want to cover with you in terms of my questioning you is your knowledge about the relationship between the American Medical Association and the tobacco industry.

Now, just a preliminary question, in terms of your involvement with Doctors Ought to Care, what is your present position with that organization?

A. I'm the executive director of DOC.

Q. Okay. And how long have you been the executive director?

A. Since 1991.

Q. Now, what is the basis for your knowledge

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about the relationship between the American Medical Association and the tobacco industry?

A. What is the basis?

Q. Yes.

A. Primarily documents that link the American Medical Association to various parts of the tobacco industry --

Q. Okay.

A. -- Companies and the Tobacco Institute and the Council for Tobacco Research.

Q. Describe for us what that relationship has been over the years. What has the relationship been between the American Medical Association and the tobacco industry?

A. Starting at what point in time? I mean, going back many years, the Journal of the American Medical Association, starting I believe in the late nineteens or early '20s, accepted cigarette advertising in their medical journal. That actually continued until 1953 or '54. I believe it was 1954 when they stopped accepting cigarette advertising in their journal. So the relationship goes back really to the early part of this century.

The more close-knit relationship they had in terms of research efforts in the tobacco issue began

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17871

officially in 1964, shortly after the Surgeon General's Report was released. However, there are some documents that discuss that the tobacco industry was trying to work with the American Medical Association as early as 1959 in terms of developing some sort of collaborative research project.

The 1964 -- there was an agreement signed by the AMA and, I believe it was, six tobacco companies in 1964. That would have been in either late January, early February of 1964. So it's literally less than one month after the release of the Surgeon General's Report.

That was a ten million dollar contract that would cover an initial five years of collaborative research.

Q. And is that a document that you've seen? I mean, how do you know that there was an agreement between the American Medical Association and these six tobacco companies?

A. I've seen that document. I've seen all -- other documents that pertain to the relationship that was established in 1964. I've also seen documents prior to that where the AMA is discussed in terms of trying to work with the American Medical Association on tobacco and health issues.

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17872

Q. And what was the course of that collaborative effort on research between the American Medical Association and the tobacco companies?

A. In December of 1963, at the AMA's mid-year meeting, the American Medical Association decided to set up a research project that looked into the smoking and health issue.

It was $500,000 that the AMA said they would

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designate for such a project. And that project would be administered by the AMA's Education and Research Foundation. It's often called the AMAERF.

THE COURT: Let me just stop you here. I mean, that's all of the testimony that he's going to be coming out with.

What I want to know is what puts him in a position to know this material, to consider himself to be either an expert in that field or have sufficient knowledge of that field, since he's neither a doctor, nor involved in the medical field in that regard.

I mean, I could read a book, for example, and just recite some of the things that I read in the book and say: Okay, I read something about it.

But I want to know what sets him apart to such a degree that he can be classified as a witness in a case with special knowledge that either nobody else

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has or has devoted time to do a specific study of this information and material.

I don't know that. All I know is that he's a member of DOC, and he's read some stuff.

BY MR. ROSENBLATT:

Q. Well, you've heard what the Judge just said. What puts you in a position to have special knowledge that would not be available to someone who's simply read a book about the years' long relationship between the American Medical Association and the tobacco industry?

A. Since its inception, DOC, the organization DOC, has worked to report on the role of physicians and medical societies on the tobacco and health issue. That has been one of the primary goals or objectives of the organization, both to increase the involvement of physicians on the tobacco issue and also to study the historical role of physicians and medical

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societies and
19 this issue.
20 Q. And have you made that study?
21 A. It's an ongoing study. It's something
that
22 we've been doing since DOC's inception, and
continue to
23 do as we gather and collect more data and more
24 information.
25 Q. On what basis, for example, would you
know

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1 the amount of money that the American Medical
2 Association has received from various tobacco
3 interests?
4 A. Are you referring specifically to the
AMAERF
5 project?
6 Q. Yes.
7 A. Well, that was reported in their own
medical
8 journal. It was public record. They made it
public
9 shortly after the contract was signed.
10 Q. And what was the amount; do you know?
11 A. $10,000,000 initially in 1964 to cover a
12 five-year period.
13 Q. Well, what puts you in a position to
have
14 special knowledge about what the tobacco industry
was
15 hoping to achieve through the American Medical
16 Association by handing out large sums of money
over the
17 years?
18 A. What puts me --
19 Q. Yes. Beyond a person who simply has
read a
20 book. What puts you in a position to be able to
21 testify about what the tobacco industry -- what
the
22 tobacco companies were hoping to achieve for
themselves
23 by giving the American Medical Association a lot
of
24 money over the years?
25 A. First of all, I don't think this
information

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1 is contained in any one book anywhere. I think
that as
2 the director of an archive that deals with this
issue,
3 we probably have some of the only remaining
original
4 pieces of information regarding this
collaboration.

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That includes things as simple as cigarette advertisements that appeared in the medical association journals.

As you know, when the medical society libraries bind their journals, put them in bound volumes, the ad pages are removed. And so we may have the only remaining medical journals with cigarette ads in them, the only remaining evidence that that ever existed, as we've collected this information.

Q. What was the tobacco industry hoping to achieve by entering into this agreement with the American Medical Association the same year the Surgeon General's Report came out in 1964?

A. To suggest that more research was necessary.

Q. And was the American Medical Association, based on all of the documents that you've reviewed, did they become a willing ally in this presentation to the American people that the conclusions reached by the Surgeon General in 1964 should not necessarily be accepted?

A. That's correct. In fact, the arrangement

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that was made with the AMAERF came literally three weeks after the Surgeon General's Report was released.

Three of the members who served on the AMAERF committee were also members of the Surgeon General's committee. And I think what they were trying to do in this collaborative effort was to suggest that maybe the Surgeon General's committee had made a mistake, maybe the Surgeon General's Report was inconclusive.

Q. And for how long a period of time did the relationship between the American Medical Association and the tobacco industry exist with respect to creating doubt as to the causation between cigarettes and cancer and/or diseases?

A. 14 years, from 1964 to 1978.

Q. And, again, you base that knowledge on what, that answer you just gave me?

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A. I base that knowledge on the last five years of my work, which is in directing the archive and going through the materials that we hold and studying the history of this issue, looking at the history of the involvement of physicians in this issue, and looking at the involvement of medical societies on this issue.

Q. And what impact, based on your research and your studies and the documents in your archives, what impact did the collaboration between the American

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Medical Association and the tobacco industry over the years have on individual doctors throughout the country in relation to their patients in advising them on the subject of whether they should smoke or not smoke?

A. Well, the -- you'd have to go back even earlier, before that agreement, before that collaborative effort started. The cigarette ads that were found in medical journals, that were contained in medical journals, oftentimes suggested that physicians prescribe, literally using the word "prescribe," in their advertising certain kinds of cigarettes, certain brands of cigarettes for their patients who smoke, and suggested that they, they themselves as a physician try these brands themselves, to see whether or not they -- if it agrees with their throat and their nose and so on and so forth.

So I think in terms of literally influencing physicians on how to educate their patients on this subject, that goes back to the 1920s, when the cigarette ads appeared in medical journals.

In terms of specifically the AMAERF project, the -- what the industry could always do, any time this issue was brought up with the delegates of the American Medical Association or another medical society, they

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25 could also point to this research that was being done,

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17878

the so-called independent research that was being done by the AMAERF, in saying we really don't have all of the answers, the smoking and health controversy continues, and we are funding the AMA to do more research in this area.

Q. And that went on for 14 years?

A. That's right.

Q. Was the research, in fact, independent?

A. It couldn't have been independent, because the members -- there were at least two members of the AMAERF committee that were appointed by the AMA to study this -- to help direct the AMAERF project and the money that came in from the industry. They also sat on the Council for Tobacco Research Scientific Advisory Board.

There was a third person on the AMAERF committee who was under contract to do work specifically for American Tobacco Company.

I don't know how that research could be considered independent when the people themselves are commingled among the industry and various parts of the tobacco industry, and the money -- of the 795 grants that were handed out or awarded by the AMAERF project, that's the tobacco industry money that goes out to research, more than a third of those grants were also

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17879

funded by the Council for Tobacco Research and/or a tobacco company.

Q. Are you saying that the American Medical Association willfully cooperated with the tobacco industry to create doubt in the minds of both doctors and the American public on the issue of whether cigarette smoking caused lung cancer and other diseases?

A. They wanted to create a controversy, and they couldn't have done it by themselves. They had to bring in some sort of medical organization or somehow influence the medical profession in order to

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create
doubt in the minds of the public and in the minds of
the medical profession itself.
MR. ROSENBLATT: Before I go to the next topic, I don't know if you wanted to hear from them or
take the topics separately.
MR. MOSS: I think we probably ought to hear
the next topic.
THE COURT: Well, all right. Go ahead and
finish up with him.
MR. MOSS: We're prepared to argue this, Your
Honor.
THE COURT: No. We'll finish up with what he
has to say and then we'll talk.

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MR. ROSENBLATT: Okay.
BY MR. ROSENBLATT:
Q. Now, with respect to advertising and promotion of the tobacco industry, prior to January 1,
1970, in terms of your archive, the DOC archives, how
far back does your documentation go as it relates to
tobacco industry advertising and promotion, pre-1970?
A. You're talking about cigarette advertising?
Q. Yes.
A. The oldest cigarette advertisement in our
collection that I've found is from 1865, I believe.
Q. Okay. If we focus, let's say, in the 1940s,
'50s and '60s, if we focus on the advertising during
those decades, in terms of the volume at DOC, what are
we talking about? How much?
A. During that -- those three decades?
Q. Those three decades, '40s, '50s, '60s.
A. Thousands of examples of advertising.
Q. And have you actually looked personally at
these thousands of advertisements?
A. I'm probably the only one who has looked at
almost all of them, because I've had to arrange them in
some sort of order, in order to be able to retrieve
them when we need to.
Q. What kind of categories do you have, in

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terms

17881

of the order, this huge volume of advertisements for these three decades? Do you have -- for example, do you categorize them by company or do you categorize them by subject matter?

A. We categorize them by brand name, which obviously then goes with the company, and then by year.

Q. And what can you tell us about health claims, if any, that were made in cigarette advertising in the '40s, '50s and '60s?

A. Well, I already mentioned the cigarette ads that appeared in medical journals. It's important to note that many of the health claims made in cigarette advertisements started in those very ads in the medical journals, and then later were promoted in the lay press, printed media.

For example, probably one of the most recognized and well-known advertising campaigns in the 1940s was a campaign for Camel cigarettes that said: "More doctors smoke Camels than any other cigarette." That started in medical journals. In fact, Camel would be present at medical society meetings, handing out free cartons of their cigarettes to the physicians at the meetings.

In order, really, to make that claim, they had to be honest and say more doctors did actually

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17882

smoke Camels than any other cigarette. That was then a campaign that made its way into the lay press: Time, Life Magazine, the Saturday Evening Post, some of the most read publications during that decade. And that's one example from the 1940s.

But we have thousands of examples where, you know, Philip Morris was using health claims in

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cigarette advertising: "An ounce of prevention is worth a pound of cure," from the 1930s and 1940s, a very popular slogan.

Old Gold was: "Not a cough in a carload."

Camel: "Be easy on" -- "T for taste and T for throat.

Easy on your throat." And today we can add T for tracheotomy.

But those are some examples that started in medical journals and were later carried on into the lay press.

Q. What was the amount of the use of famous athletes in advertising in the '40s and '50s?

A. Well, there's a certain irony there. Joe DiMaggio was well-known for promoting Camel cigarettes.

Babe Ruth did Ralieghs. Stan Musial was Camel. Lou Gehrig was Camel and Chesterfield.

They used to say: "They don't get your wind. Smoke as many as you please," was an example where Lou

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Gehrig promoted Camel cigarettes.

MR. ROSENBLATT: All right. I would just have, you know --

THE COURT: All right. Let's find out -- do you want to --

MR. MOSS: What I'd like to do is I'd like to excuse the witness.

THE COURT: All right. Go ahead.

MR. MOSS: We've heard pretty much.

(The witness exited the courtroom.)

MR. HEIM: Your Honor, I'll start out. I tried to take notes as we went along here. It seems to me that what this witness is saying is that he's been the curator of the advertising that was collected by Dr. Blum over the course of a great number of years in the archive.

And some of this material that he has collected in this archive apparently has to do with the American Medical Association, and there are documents that say the American Medical Association received X number of money, amount of money to fund grants.

I don't think there's much dispute about

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what
those documents say. I may even have said that in my
opening statement. I'm not sure whether I did or I
didn't. But all this man is is a vehicle for saying

17884

what are in documents. I mean, that's essentially what
he is.
He's saying: I've seen a certain number of
documents.
I'm pretty sure he hasn't reviewed the
American Medical Association documents or their history
or their information. So he is, on the basis of having
seen certain documents, going to say what's in those
documents, and that's not a proper subject for expert
testimony.
He has no expertise to offer an opinion based
on that. That's the problem here. He has no special
training or -- the jury can just as well draw whatever
inference they want to draw from the fact that there's
a document that says that the Council for Tobacco
Research gave $10,000,000 to the American Medical
Association Education Research Foundation.
And you, Counsel, can argue as to what that
means or what it doesn't mean.
And I guess I can argue. But he has no basis
to draw a conclusion that tars and makes pejorative
comments about the American Medical Association based
on those documents.
What he is is a layman making an inductive
leap. And that's what he is on this whole subject of

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17885

the American Medical Association.
MR. MOSS: Before you leave that, Bob, let me
just make one comment that I think, Judge, says it all.
What his alleged, quote, "expert opinion" is,

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and I agree with Mr. Heim, this man has no expertise to render any such opinion because, as he said, he's the one that, I guess, catalogs all of these advertisements. He says he's seen more of them than Dr. Blum. But so what?

What he said was, when Mr. Rosenblatt asked him: Well, what I believe is that the tobacco companies were hoping to achieve, by donating that money, to promote a controversy.

Judge, certainly this man has no expertise to render such opinion, nor really does any witness. And once again, we're now getting into areas that invade the jury's province.

He's coming in here and saying: Well, I believe that they gave this money because they wanted to promote a controversy. I believe that they were good enough to pull the wool over the eyes of the AMA. I believe the AMA was fooled.

Judge, that's the bottom line of all of this, what this man is suggesting.

I can go on and on, because -- yes, he says:

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I believe the AMA became a willing ally. I think what they were trying to do was to suggest that the Surgeon General's Report was inconclusive.

Mr. Rosenblatt asked him: What impact did the collaboration between the AMA and the tobacco companies have on doctors in advising their patients not to smoke?

I mean, Judge, I don't know if you want to hear some more. He says: I don't believe, in my opinion, that the board, the people that were on the board of the collaborative effort, could have been independent because some of those people served on the CTR SAB.

Judge, no witness can come in here and say that. And certainly a witness without any -- I mean, I don't -- I guess what I'm saying is two things. Number

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one, I don't believe any expert can come in here and have credentials to say: I believe that someone could not be independent.

If there's a fact witness here that talks about that, that's different. But he can't come in and say he wasn't independent. He can come in and say: But at the same time that person was working for CTR.

And then we move to this witness and his qualifications, and with all due respect, they don't

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even approach the qualifications of an expert to render opinions in this case about anything.

And as far as the ads are concerned, not an ad was identified as a reliance document. Therefore, everything that this witness has to say is pure and simple hearsay, and he is absolutely the classic example of an impermissible conduit.

MR. HEIM: With regard to the ads, there's one other thing that I noticed.

You know, Your Honor expressed concern before about Dr. Blum being careful to not be an advocate and confine himself to the subject of his expert testimony.

And I'm sure this witness was cautioned to do the same, but he couldn't help himself, while he was up there, even in just talking about some of the ads, he jumped into talking about T, and then he said: Now T is for tracheotomy.

That's the kind of problem that you have with somebody who's not really an expert. An expert understands what his or her role is within litigation.

This man, with all due respect, is not an expert. He is an advocate. He has a certain kind of training, but he has no expertise here.

THE COURT: Well --

MR. ROSENBLATT: I would just be repeating

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17888

myself, as they constantly do. There's no -- at some point, you know, the time has run out.

THE COURT: The problem in this case, as compared to other cases in which the testimony is rather definitive along the lines of medical malpractice, legal malpractice, negligence cases and things of that nature -- it's pretty cut and dried.

This is not a cut and dried situation. This is a very expansive, unusual situation where people are coming in and testifying in various fields, which have developed over years and years and years, of either research or study or experimentation, all sorts of things, and of necessity involves thousands and thousands of people, thousands and thousands of documents. So, it makes it very difficult to make a determination as to what one particular person knows and doesn't know, should know or couldn't know.

Then we get into this area of: What are we really talking about here? My understanding of what this man says and what he does, I think it goes far beyond being, number one, a curator; number two, a keeper of the archives in that regard or a custodian of records.

I think what he is is basically functioning in the role of a historian. And if one looks at that

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17889

role and says: If he's an historian what do historians do? They collect the data and interpret what it means.

If you go through history, you'll go to your high school days as to what it was that was going on in those early historian days of one country doing this and one country doing that, and what did they really have in mind, what were they doing, what is the meaning of this, what is the meaning of that, that stems from the study of the history.

It seems to me there's been a study

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being
made of the history of the tobacco industry through its
either advertising or its association with various
other associations, including the AMA. That would be
basically the function of an historian, and that's
basically what he said. So, in that regard, I suppose
you reach certain conclusions.
Now, a lot of what he said appears on the
face of it to be speculative and conclusory. And I do
understand that. On the other hand, there's a lot of
what he says which is the function of a person who has
made a study of what the documents were, and in
conjunction with the position and other documents, how
it figures in with other material and what the eventual
meaning and conclusion of the inner workings of the
documents and the associations comes to be.

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And it makes it very difficult to decide in
this case whether he's got a specific expertise in a
particular field or whether he's qualified to render
so-called, quote, "opinions" about certain things,
without speculating. That's very difficult.
MR. HEIM: Your Honor, historians -- I agree
with Your Honor about historians, in that people can do
an historical analysis.
But, generally speaking, at least in my
experience, people who do that are trained to be
historians. Being an historian is a systematic body of
knowledge. There's an historical method; there's an
historical analysis. It's more than just a lay person
coming in and reading things and saying: On the basis
of what I read, I have an opinion.
And he has no training in that.
THE COURT: That may be so, but when you look
at the difference between a lay person and expert
opinion, one has a specific knowledge of something and
a lay person doesn't. I'm sure these people on the
jury have no knowledge of the tobacco industry.

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22 MR. MOSS: It's more than specific knowledge.
23 We get back to the line of cases we spoke about
24 earlier.
25 Judge, you have to demonstrate, through

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1 education, and this man is not an historian.
2 THE COURT: I don't think you have to
3 demonstrate through education anything.
4 MR. MOSS: Well --
5 THE COURT: I mean, that's what we talk about
6 a lot, but it really doesn't mean -- it's experience
7 and what he does for a living and how he does it and
8 the information that he's garnered along the way.
9 You know, a lot of us came out of law school.
10 We weren't expert in a thing. Nothing.
11 MR. MOSS: A lot of us still are not.
12 THE COURT: That may be.
13 MR. MOSS: I'm speaking for myself.
14 THE COURT: What makes you an expert is your
15 experience along the line and your hands-on.
16 MR. MOSS: But you have to demonstrate that
17 expertise, Your Honor.
18 THE COURT: Well, the difference between
19 demonstrating expertise and a lay person's expertise is
20 quite obvious.
21 MR. MOODHE: Your Honor, if I may,
22 specifically on this AMAERF point, Mr. Solberg
23 indicated that his knowledge was based on reading some
24 documents. These documents aren't documents that are
25 incapable of being understood by the average person

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1 sitting on that jury.
2 If Mr. Rosenblatt wants to put those
3 documents, if they're admissible, put them in front of
4 the jury, they can see it's dollars and cents; it's in
5 a contract.
6 THE COURT: I understand that. But when you
7 make a study of something, you go beyond that.
8 MR. MOODHE: But there's nothing to study
9 here in terms of forming an opinion. It's a matter of
10 fact.

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11 In addition, none of these documents were
12 identified as documents that Mr. Solberg was going to
13 be addressing.
14 THE COURT: My biggest problem --
15 MR. MOODHE: We can address that now.
16 THE COURT: My biggest problem is not
17 Dr. Solberg's knowledge. My biggest problem is with
18 the disclosure.
19 I wonder why you did it the way you did it.
20 That's what bothers me about it. And why you waited
21 until now to put this particular witness on, when the
22 information you really wanted from this guy could have
23 come out long before the others had testified. But now
24 I got stuck with it.
25 Let's take a few minutes while I think about

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1 it.
2 (A brief recess was taken.)
3 THE COURT: Have a seat.
4 I really am in pretty much of a quandary at
5 this point.
6 This witness is not going to testify with
7 documents?
8 MR. ROSENBLATT: Correct, Your Honor.
9 THE COURT: Which makes it very difficult.
10 MR. ROSENBLATT: He's going to just talk, you
11 know, broadly about --
12 THE COURT: Well, that makes it even worse.
13 See, if he had the documents with him and could relate
14 to a particular document, I wouldn't have much of a --
15 MR. ROSENBLATT: Oh, I've got the documents.
16 THE COURT: Well, that's what I'm talking
17 about.
18 I mean, he's already mentioned this document
19 with the AMA. He's talked about other documents. He's
20 talked about advertisements of which he has copies or
21 the originals thereof.
22 To testify without showing the documents or

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23 having the documents presented through him makes it
24 very difficult, or through someone else, which we don't
25 have.

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17894

1 My inclination is to not allow him to testify
2 at this time, unless he can testify with the documents
3 that he's making reference to. And that's really the
4 way I feel.
5 Most of everything he says goes, then, to the
6 hearsay area, which is very difficult to overcome.
7 So I'm not going to let him testify at this
8 time. I'm not excluding him totally. If you can come
9 up with the documents through him, with him, I'll let
10 him testify about it. But especially the ads that he's
11 talked about.
12 MR. ROSENBLATT: I'm going to have him go
13 through them while we discuss the video of the --
14 THE COURT: If he has them with him. The
15 documents are available today?
16 MR. ROSENBLATT: I think they are.
17 THE COURT: Well, if they are, that's one
18 thing.
19 MR. MOSS: Well, Judge --
20 THE COURT: Then we allow the defense to look
21 at them.
22 MR. HEIM: Your Honor, we don't have the
23 documents.
24 THE COURT: My inclination was after we -- if
25 you get to that point, to allow him to be deposed by

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17895

1 the defense on those issues that he's testified about
2 that he has not been deposed on before. Okay.
3 So, that's where I'm going to go with that.
4 I'll defer his testimony until after that's done.
5 All right. Which then leads us to another
6 problem. What are we going to do the rest of the day?
7 MR. ROSENBLATT: Well, we're prepared to

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show
the video deposition of Dr. Homburger and we've got to
go through it.
THE COURT: Yes. I know. But I don't have
it. I didn't have it upstairs, and I don't have it
here.
I was delivered yesterday -- last night --
which one is this? Cohan or Cahan?
MR. MOSS: I think we provided you this
morning.
THE COURT: This morning. Whatever. I
didn't get it last night because I wasn't here last
night after 5:30. It didn't show up. So if this is
the one that came from you --
MR. MOSS: We told you on Tuesday we would
have it here 8:30 this morning.
THE COURT: This is the one. I just looked
through it like this. All I see is yellow, yellow,
yellow, which means almost the whole thing is

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designated. Of course there are counterdesignations.
MR. MOSS: We told you that on Tuesday.
THE COURT: So I said I certainly couldn't do
this this morning. That's almost impossible.
Now you're talking about Homburger. I
haven't seen that one.
MR. MOODHE: Your Honor, I'm kind of
surprised, because a couple of weeks ago you said you
couldn't find it, and I gave another copy to Olga that
day.
THE COURT: Homburger. Well, maybe I'm
wrong, because I've got a whole box full of stuff. Let
me go upstairs and see if I can find it.
MR. ROSENBLATT: We have Homburger for you.
THE COURT: Oh, all right.
MR. ROSENBLATT: And it's marked.
THE COURT: I don't have the luxury of having
mine categorized.
MR. MOSS: Judge, what are we going to do
with the jury?
THE COURT: That's a very good question.
That's one of the big problems. They can go
Christmas

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shopping or something. I don't know.
This runs 250 pages, basically. This is not designated, or is it?

17897

MR. ROSENBLATT: It is.
MR. MOODHE: It is.
THE COURT: All I have is green in here.
MR. MOODHE: The direct testimony happens to be about 30 pages, right at the beginning, which is yellow.
THE COURT: Well, that shouldn't be that bad.
Let me see. If the direct testimony is --
let me see how you did this.
MR. MOODHE: I don't know to what extent Mr. Rosenblatt intends to object to the counterdesignations, which are fairly extensive. We have some objections to the first 30, but they aren't that bad.
THE COURT: Well, the counterdesignations should relate only to the testimony that's been produced by the plaintiff and not in the entire deposition.
MR. MOODHE: It does, Your Honor. I mean, the problem with -- let me just give you an overview, and I can probably remind you of this deposition that was played to the jury last year, with the use of two words, pseudoepitheliomatous hyperplasia, that you will remember was --
THE COURT: I never heard that expression.

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17898

MR. MOODHE: I knew that.
MR. MOSS: That makes two of us, and we were both here.
THE COURT: Not only did I not hear it, I couldn't spell it and I couldn't repeat it.
MR. REID: Sounds like more than two words to me, Judge.
MR. MOODHE: You'll remember that the thrust of the direct examination of Dr. Homburger --

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THE COURT: Yes.
MR. MOODHE: -- was that he was working under a contract for the Council for Tobacco Research; that he had prepared a publication; that he was going to use a term "microinvasive cancer"; and that he was visited by CTR officials, who wanted him to use the pseudo term.
THE COURT: Before you get into all of that, apparently your counterdesignations are far more extensive than the plaintiffs' designations. We have to go through it. The jury is sitting in there, meanwhile.
I'm going to give them a choice as to whether they want to leave for an hour or stay in there an hour, because I think it will take us that time to do that.

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MR. HEIM: Okay.
MR. MOODHE: As I say, it depends upon what Mr. Rosenblatt objects to. Our objections are quite few to the direct.
And just to put this in perspective, what this is, really, is a scaled-down version, because I edited out a lot of the designations we had made last year. So this is a scale-downed version of what was actually played to the jury in Broin last year.
THE COURT: Here is the point. My problem is, I don't want to use this deposition on the plaintiffs' case for your benefit, if basically what you want in here is stuff you would normally put on in your case --
MR. MOSS: No, sir.
THE COURT: -- with this document, motion to dismiss.
MR. MOODHE: No, sir.
THE COURT: It seems to me with his minor numbered designations, as compared to your major number of designations, that this whole deposition would relate to that.
MR. MOSS: Yes, sir.

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24 MR. MOODHE: Yes, sir.
25 MR. MOSS: All of that cross relates to the

17900
1 direct.
2 MR. MOODHE: That's correct.
3 MR. MOSS: I think you'll find that.
4 MR. MOODHE: Basically, because he testified
5 on direct these are scoundrels, and we spent a lot of
6 time proving he was wrong.
7 THE COURT: All right. I'm going to have to
8 read it and go through it.
9 Do you intend to use all those designations
10 that you listed on this?
11 MR. ROSENBLATT: All that we've listed?
12 THE COURT: Yes.
13 MR. HEIM: I think the issue, Judge,
14 Mr. Moodhe is trying to present is if plaintiffs don't
15 have objections to the counterdesignations, you could
16 probably go through the few objections here in just a
17 couple of minutes.
18 THE COURT: Okay.
19 MR. HEIM: If there are no objections, we
20 could probably do that in 15 minutes. If there are
21 objections to the counterdesignations, we need to know
22 whether --
23 MR. MOSS: We need to know now so you can
24 guide yourself.
25 MR. ROSENBLATT: That will depend on the

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17901
1 Judge's ruling on our designations, but we're going to
2 have some designations.
3 THE COURT: Let me just take a look and see
4 what you've got here, just briefly.
5 If I'm looking at this thing starting on
6 Page 9, is where you start, and I flip through this,
7 initially their first objections are -- well, this
8 looks like it's brown now.
9 MR. MOODHE: That would be an objection. It
10 didn't copy into orange.
11 THE COURT: So your counterdesignation is,

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what, green?
MR. MOODHE: Yes.
THE COURT: Okay. So there's an objection on Page 14 and 15. Then we move over -- see, this is what's confusing me. Just take -- turn to Page 21.
MR. MOODHE: Yes, sir.
THE COURT: And if you look, starting at Line 10, you see, it looks to me like he's finished with his presentation on Line 9, and then you've got -- it turns out to be brown now.
MR. MOODHE: Right.
THE COURT: I can't tell if that's overlaid over his designation or not.
MR. MOODHE: It is, Your Honor. Anything

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that's brown is an objection to something that they designated. They designated; we objected to that portion.
THE COURT: Because I can't tell, you know, because of the coloration.
Just look at Page 23. There is more of a distinction.
MR. MOODHE: Same thing. They designated five through 20. We objected.
THE COURT: It doesn't look like that.
MR. MOODHE: Well, I apologize for it not --
THE COURT: No. I mean, it really doesn't -- because of the way the squiggly line goes, it doesn't look to me like there was any yellow there at all.
MR. MOODHE: There was; otherwise, I wouldn't have objected to it.
THE COURT: Humn?
MR. MOODHE: Otherwise, I wouldn't have objected to it.
MR. HEIM: Give the Judge your copy.
THE COURT: You may not like the question, but he may not have designated the question.
MR. MOODHE: He did.
THE COURT: Well, I'm not so sure, I mean, if I look at it.

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MR. MOODHE: I took Mr. Rosenblatt's schedule of designations and that's how we marked this up.

THE COURT: Well, take a look at Page 23. Okay. And Line 5 through 14. Did you designate that section?

MR. ROSENBLATT: Yes. I think they -- my understanding is, as I'm looking at our list, that they would not be objecting to something which we had not designated.

THE COURT: I would understand that.

MR. ROSENBLATT: Yes. So I'm presuming --

THE COURT: What I'm saying is if you look at my copy.

MR. ROSENBLATT: The same thing with my copy. I think when you make brown over yellow, the yellow kind of disappears.

THE COURT: Okay. I'll take it for that, then. That's no problem.

MR. ROSENBLATT: I think that's a fair presumption.

THE COURT: And when I get through Page 30, in that area, 31, then we start getting into all of the green stuff.

Now, I don't have any way of knowing what you objected to as far as their counterdesignations,

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because I don't have a color code for that.

So, how did you designate your objection to their counter?

MR. MOODHE: Just for the record, Your Honor, we didn't receive any objections to those counterdesignations.

MR. ROSENBLATT: It would probably take me about 15 minutes, Judge, to go through -- to go through it and see what I'm really objecting to. I think there are whole areas that we do not think that are in response to our direct examination.

THE COURT: Okay. I just hate to have the jury just sitting around.

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MR. ROSENBLATT: No. I agree. It would probably make sense to let them go for a while.
THE COURT: All right. Why don't you bring the jury out and tell them that they'll probably -- don't have to get too formal about where they're sitting and whatever.
THE BAILIFF: Just bring them in?
THE COURT: Yes. Bring them in.
If you're going to use a lot more depositions from this point on, we're going to run into this problem.
MR. ROSENBLATT: I know.

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17905

THE COURT: I've got to know in advance what's happening. I've got to have the deposition so I can go over it.
THE BAILIFF: Bringing in the jury.
(The jury entered the courtroom.)
THE COURT: Come on in. Have a seat. Okay. Good morning, all.
JURORS: Good morning.
THE COURT: You all may be seated. Thank you.
What our problem is this morning, we've had a slight change of plan. Are you all listening?
JURORS: Yes, sir.
THE COURT: He's not.
We've had a slight change of plan. And what we had intended to do at this point we're not going to be able to do, so we're trying now to do something else. In order to do what we have to do as a fallback position, we've got to go through some of this stuff here. And I have got to do that without you people here.
So I'll leave it up to you all. I figured I'd release you for a while so that you wouldn't be cooped up in that room, do what you have to do, or if you want to stay there, that's okay, too.

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17906

But I'll give you that choice. Just to let you know that we have things to do, we have to get it

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done and it's going to take a little bit of time.
So, maybe, what, a half hour, 45 minutes?
MR. ROSENBLATT: 45 minutes.
THE COURT: About 45 minutes.
So, what are we talking about? We're talking about come back here at 11:00. All right. And we'll try and work it out that way. I'd rather do that than have you sit there, unless you want to.
Okay, folks.
(The jury exited the courtroom.)
THE COURT: Okay. Have a seat.
MR. ROSENBLATT: I need a couple of minutes to talk to Mr. Solberg.
THE COURT: Okay. Go ahead. The jury is going to be going out that way, or do you go down the stairs?
MR. ROSENBLATT: I'll wait a few minutes.
THE COURT: I think they go down the stairs first. Go ahead.
(A brief recess was taken.)
MR. REID: Judge, can I point out, thinking ahead, you have the Cahan deposition.
THE COURT: I do.

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MR. REID: And our objections. So today, if you have some time, you might want to -- in your spare time. I want to make sure it's up there on your chair.
THE COURT: Wise guy.
I have to read the whole thing because almost everything is designated and counterdesignated.
MR. REID: Yes, sir.
THE COURT: And objected to.
MR. REID: And we have a general objection.
MR. MOODHE: We were thinking it probably would be riveting, the Homburger deposition, so you wouldn't want to read that during that time.
THE COURT: You might have a point. I know some judges that just walk out when the depositions are being done. I don't do that.
Okay. Let's talk about Homburger, then.
MR. ROSENBLATT: I have a proposal,

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which --
THE COURT: A proposal?
MR. ROSENBLATT: -- which will save everyone a lot of time.
THE COURT: Yes, sir.
MR. ROSENBLATT: My proposal is, although they have designated way more than we have designated in this deposition, if they don't object to our designations, we won't object to their designations,

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and let's just show it. And let's just show it.
THE COURT: You mean the whole deposition?
MR. ROSENBLATT: Whatever -- whatever I designated, whatever they designated.
THE COURT: Is it a video?
MR. ROSENBLATT: Just show it. Yes.
THE COURT: Oh.
MR. ROSENBLATT: We're ready. We'd be ready to go. Otherwise, it's -- because they designated so much more, a lot of which we think, you know, is unrelated to the direct, but I'm willing to do that.
THE COURT: What about all of the stuff that's not designated?
MR. ROSENBLATT: We'll just -- no, no. We've got an operator. Mechanically, that's no problem.
THE COURT: What about that?
MR. HEIM: Your Honor, I think I'll give Mr. Moodhe a chance to look at it for a minute.
MR. MOODHE: Yes. I'm just looking. I could do that with two exceptions.
THE COURT: Yes.
MR. MOODHE: The first is the text that's at the -- begins at Page 14, Line 12.
THE COURT: Right.
MR. MOODHE: I would object to that as -- it

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has nothing really to do with the core issue here, what he's being asked about. What happens is he's asked a question about Dr. Little, and he gives back some hearsay answer that Dr. --
THE COURT: Wait, wait. Let me put it in context so I understand it.
The question before that is: What was

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the
Jackson Laboratory? And he talks about that.
And then the question on Line 12 is: I take
it when you first began doing work funded by the
Council for Tobacco Research you had a lot of respect
for Dr. Little.
And he said: I did.
Question: Did that ever change?
Answer: Well, it changed as he changed in
his attitude toward the job he obtained from the
Council for Tobacco Research.
He goes on to say something else.
Yes. Well, what do you say about that? It
doesn't appear to be --
MR. ROSENBLATT: Judge, there's a zillion
examples like that. I mean, my proposal is made
without exceptions. This is not a big deal, really.
THE COURT: Well, the question and answer on
that point has nothing to do with substantive

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testimony.
MR. ROSENBLATT: Well, it does. It does come
in, because the head of -- there's going to be
testimony in this case that they picked these hot shot,
superstar scientists to be the head of the Council for
Tobacco Research, and the implication is that they had,
you know, universally recognized and respected, and
here is a colleague who respected him at one level and
didn't respect him in another. He liked this job.
It's not a big deal.
I'm not going to -- to our disadvantage,
because there's a lot of things that I don't like that
they have.
THE COURT: Sure. What's the next one you
have? Just to put them together.
MR. MOODHE: The other one I would be
concerned about is the text that's on the bottom of
Page 30.
THE COURT: 30.
MR. MOODHE: This relates to Dr. Homburger's
view that CTR should have a press conference cover --
THE COURT: Wait, wait.

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23 MR. MOODHE: I'm sorry.
24 THE COURT: Page 30.
25 MR. MOODHE: Page 30, Line 17 through 24.

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17911

1 THE COURT: Let me read it. The first
2 question is: How did what happen?
3 MR. MOODHE: Well, I guess it's the question:
4 How did that happen?
5 THE COURT: Oh, the meeting didn't take
6 place. Okay.
7 Why not?
8 THE COURT: What he said is somebody
9 cancelled him.
10 MR. MOODHE: Yes. I don't -- what happened
11 actually comes out in the text before and after. What
12 I objected to was the fact that -- I mean, the
13 objection could have been much broader, but he says in
14 his portion that he found out, during the course of his
15 testimony during the Cipollone case, but the substance
16 of what happened comes out, and I'm not going to object
17 to that, but just that he refers to his answer in
18 learning about this through Cipollone.
19 THE COURT: On Page 30, he says: Did you
20 have a press conference? On Line 7.
21 And Line 10 says: I was supposed to have a
22 press conference, but it did not take place.
23 And then he finds out later that a P.R.
24 person working for CTR arranged to cancel the
25 conference.

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17912

1 MR. ROSENBLATT: This is gone into in their
2 crossdesignations.
3 MR. MOODHE: And I would eliminate those.
4 Well, the subject matter is still in.
5 THE COURT: Well, I think it may be
6 important, who cancelled it and why. Maybe that's
7 important. I don't know if it is or it isn't. It's
8 not objectionable.
9 All right. Let's run it the way it is, then.
10 MR. MOODHE: Your Honor, I would then just
11 preserve any objections to the admissibility of any

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12 documents that are referred to during the course of the
13 deposition. That's something to be ruled upon later,
14 and I don't mean to be waiving those objections now.
15 THE COURT: All right. We'll do that. All
16 right.
17 MR. SCHNEIDER: One other housekeeping
18 matter, Your Honor. On November 30th, Dr. Cummings
19 testified in this case, and during his testimony he put
20 on a slide presentation. And the slides were given to
21 plaintiffs' counsel. We made a copy of those, had a
22 printout of those slides made. I provided them to the
23 clerk today and they will be marked in evidence in this
24 case.
25 THE COURT: Wonderful. Thank you. That's

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1 the first positive thing that's happened all day.
2 MR. ROSENBLATT: The first positive thing is
3 that we saved you the trouble.
4 THE COURT: Right. That's positive.
5 MR. ROSENBLATT: That's positive. That's
6 pretty positive.
7 THE COURT: All right. So the jury will be
8 back at 11:00.
9 MR. ROSENBLATT: So I'll get the video and
10 we'll get it -- I need -- I have to give the video man
11 your copy, Judge, so he'll know where to hit the
12 button.
13 THE COURT: All right. This is Cahan.
14 This is it. Okay. Look at Page 22. Just
15 one that just popped out at me when I read it. There's
16 a colloquy there. There is a designation or an
17 objection to all that. Unless you check it, that will
18 not be caught by the --
19 MR. MOODHE: I think that was just noted,
20 Stanley.
21 THE COURT: Tell him to cut out the colloquy.
22 MR. ROSENBLATT: Okay.
23 THE COURT: I just happened to notice that.

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24 MR. HEIM: How long does it run, Stan?
25 MR. ROSENBLATT: I don't know.

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17914
1 THE COURT: How long was the depo? You could
2 start beginning to end.
3 MR. MOODHE: It was probably a five-hour
4 deposition. It would probably play two to three hours.
5 THE COURT: I doubt it. I don't think
6 there's that much in it. Cahan, there's everything in
7 it. That one won't run that long at all. Okay.
8 (A brief recess was taken.)
9 THE COURT: Okay. I guess we can proceed.
10 They're all back now.
11 You have your operator here?
12 MR. ROSENBLATT: Yes, Judge.
13 THE COURT: And he's got the script? Where
14 did he go?
15 MR. ROSENBLATT: He just walked out. Here he
16 is.
17 THE COURT: Here he comes. Okay.
18 You don't know how important you are. We
19 can't do a thing without you.
20 THE VIDEOGRAPHER: I just wanted to wait
21 outside for you.
22 THE COURT: You know what your script is?
23 THE VIDEOGRAPHER: I'm all set. Yes.
24 THE COURT: Then we can proceed. Do you have
25 any idea how long?

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17915
1 THE VIDEOGRAPHER: Well, Your Honor, these
2 tapes generally run about two hours a piece and there's
3 three, so I would say there's four hours of recording
4 material.
5 THE COURT: A lot of that is going to be cut
6 out.
7 THE VIDEOGRAPHER: Some of that will be cut
8 out and I'm going to fast forward through any long
9 segments.
10 THE COURT: All right. Bring the jury in.
11 THE BAILIFF: Bringing in the jury.
12 (The jury entered the courtroom.)
13 THE COURT: Okay. Well, good morning.

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JURORS: Good morning.
THE COURT: Okay. Pleased to report that since you were gone, we went through what we had to do, and we've now narrowed it down to a televised deposition.
I will tell you in advance, in its form it runs a couple hours, or several -- I'm not really sure, but we'll take a break, a convenient break for lunch somewhere along the line. It's going to be two or more hours for this deposition on videotape. And of necessity, we'll have to fast forward through a lot of stuff, too. So, be advised of that.

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And as I said before, the rules applying to depositions and taped depositions, as far as testimony is concerned, you've already been told about and those same rules apply.
This is the deposition of Dr. Homburger.
MR. ROSENBLATT: Dr. Freddy Homburger, Judge, taken on May 28th, 1997.
THE COURT: All right.
MR. ROSENBLATT: H-O-M-B-U-R-G-E-R, homburger.
THE COURT: Okay. You may begin.
(The videotaped deposition of Dr. Freddy Homburger was played as follows:)
Thereupon:

FREDDY HOMBURGER, M.D.

having been called as a witness, was duly sworn, examined, and testified as follows:

Q. Doctor, please state your name.
A. My name is Freddy, F-R-E-D-D-Y, Homburger, H-O-M-B-U-R-G-E R.
Q. Where were you born, Doctor?
A. I was born in Sankt Gallen, Switzerland, on February 8th, 1916.
Q. Where did you attend medical school?
A. I went to medical school in Geneva,

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Switzerland, and for one year in Vienna, Austria.
Q. And when did you come to the United States from Switzerland?
A. I came to the United States on June

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23rd,
1941.
Q. Take us through your training and your career
in the United States.
A. At the beginning, I came for one-year fellowship in pathology at Yale, and I stayed for two
years, and subsequently was struck after Pearl Harbor
for another five years, during which I spent two years
at the Thorndike Laboratory of Harvard University Medical School in internal medicine and three years at
the Memorial Hospital at Sloan-Kettering Institute in
New York, the cancer research, and at Cornell at the
same time as an instructor.
I then went to Tufts University in Boston to
start a cancer research and cancer control unit in its
medical school in 1948, I believe it was by then. And
ten years later, I left Tufts to found my own
organization, Bio-Research Institute and Bio-Research
Consultants in Cambridge, Massachusetts.
And I became, a few years later, a research
professor in pathology at Boston University School of
Medicine, which I am still to this day.

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I am board qualified in pathology and internal medicine. And I'm board certified in toxicology. And that was, I believe, in 1982.
Q. And while at Tufts, what kind of work did you
do?
A. At Tufts, I started a cancer research unit
which consisted of one basic research laboratory where
animal research was done at the Tufts Medical Center
and two affiliated chronic disease hospitals -- one in
Cambridge, one in Roxbury -- where we had access to
advanced cancer patients and experimented with the
early phases of chemotherapy.
Q. And what kind of work have you done at Boston
University?
A. At Boston University, I was mostly involved
in pathology, in teaching. And, of course, all my

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work
at the Bio-Research Institute and Bio-Research Consultants was done while I had an appointment at Boston University.
Q. And you still currently have an appointment with Boston University?
A. I still am a senior scientist at the Mallory Institute of Pathology at Boston City Hospital and a research professor in the department of pathology of Boston University School of Medicine.

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Q. Tell us when it was that you became interested in the study of cancer, and particularly, causes of cancer.
A. Well, at the time when I obtained a position at the Sloan-Kettering Institute and Memorial Hospital, it was very hard for physicians to find positions because it was the end of the war and everybody returned.
So it wasn't really by choice and first preference, but the opportunity was offered me to have a job at Memorial Hospital and Sloan-Kettering Institute and Cornell, and so I took it.
And I was fascinated from the very start not only by the problem, which is still with us, but also by the extremely advanced technology that was then already available in this highly-specialized situation.
Q. How did it come about that you started doing work which was funded by the Council for Tobacco Research?
A. That is a long story which begins with my friendship with Dr. C.C. Little, who became the director of the Council for Tobacco Research after his retirement from the Jackson Laboratory in Bar Harbor, Maine.
I needed an advisory council at the Tufts

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University situation because this was new and very --
what is the word -- very difficult to integrate in the

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existing system of the university. So I thought of Dr. Little, who was then very renowned as a geneticist. And he was very happy to serve as an advisor to our unit.

And then he suggested that some of our personnel spend a month or two each summer at the Jackson Laboratory in their summer program, and this we did. And he asked me in 1948, a year after the big fire in Bar Harbor, to give a talk at his institution.

And both my wife and I were fascinated with Maine, bought some land, built a house there in 1952, and spent every summer working with the Jackson Laboratory, as long as Little was in charge.

That is why, when he became the director of research for the Council for Tobacco Research, he chose our organization as one of the first ones that they supported.

Q. And what was the Jackson Laboratory? Tell me a little bit about that.

A. The Jackson Laboratory was then a pioneering laboratory in research on genetics of mice, and also beagle dogs. And Little was probably the world authority on mouse genetics.

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And cancer research was one of the interests because some of their strains developed tumors and others did not. And I became very much interested in genetics of experimental laboratory animals by this contact.

Q. I take it when you first began doing work funded by the Council for Tobacco Research, you had a lot of respect for Dr. Little?

A. I did.

Q. Okay. Did that ever change?

A. Well, it changed as he changed in his attitude toward the job he obtained from the Council for Tobacco Research.

And when I argued with him that he should insist on having the Council put aside a fund in

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escrow
for his salary so he could be free to do whatever he
felt was the right thing to do, he said that he liked
the position; that he didn't want to risk to lose it;
and that he could do what he pleased because, and the
quote, "My sarcophagus is built."
And from then on, I gradually realized that
he was not only a great man but also an apolitantistic.
And my attitude didn't change as far as he as a friend
and human being was concerned, but I didn't trust his
judgment in scientific matters anymore.

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17922

Q. And my question, Doctor, is, when did you
begin doing research funded by the Council for Tobacco
Research?
A. That was at the time when Dr. Little retired
and became director of the Council for Tobacco Research
and was probably 1956 or so.
Q. So sometime in the 1950s?
A. Sometime in the late 1940s or early '50s.
Q. Would you tell the jury a little bit about
the work that you began doing, which was funded by the
Council for Tobacco Research?
A. Well, the basic idea was to find a disease
model in an experimental animal that could be tested
for smoke inhalation.
And in the first instance, we started out
with mouse skin paintings, which was at the time the
only method to get cancer induced with tars from
cigarettes in mice that Lindel in 1953.
And then we began to develop a smoking
machine with the intent of being able to expose animals
to smoke in a way which approached that to which -- in
which smokers are exposed to smoke.
And all that started at about the same time
and was carried on for many years before the smoking
machine was eventually developed to the extent

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17923

thought it was useful in 1969.
Q. And what kind of research or describe for the jury the research that you did with the smoking machine.
A. And then we tried to see what happened when mice and rats were exposed to smoke. And we found very quickly that both species were very susceptible to the toxicity of the smoke and died within a relatively short period of time before it would have been possible to develop cancer.
Then, by accident, we got approached by Dr. Whitney, Ray Whitney, who was interested in developing inbread strains of Syrian hamsters. And she became associated with our institution.
And so we exposed Syrian hamsters to the smoke, and we found very quickly that the Syrian hamster was much more resistant to smoke toxicity and could tolerate and even seemed to like large doses of smoke inhaled.
So there was an opportunity of developing a system if we could produce cancer or pre-cancerous conditions in the respiratory tract of these animals, which in the course of years we did.
Q. What kind of cancers did the hamsters develop?

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17924

A. In the susceptible strain, about half of them developed carcinomas or precancerous lesions of the larynx, the upper respiratory tract, and some changes in the lungs, which indicated that smoke did reach the lungs, but to a much lesser degree than at the other areas of the respiratory tract.
Q. What is the larynx?
A. The larynx is the proximal end of the wind pipe where the voice is formed.
Q. And what was the significance in the hamsters of some smoke reaching the lungs with respect to the

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animal model that you were trying to develop?
(Fast forwarding.)
A. Well, if the smoke had not reached the lungs, there would have been no histological change to be seen. And in all animals that smoked, there were some infiltrations with mononuclear cells in the lungs, which showed the mild inflammation and was proof that some of the smoke did reach the lungs.
Q. And how did the hamster, as an animal model, with respect to the smoking and lungs compare with the human model or human beings?
A. Well, I wouldn't like to comment on that.
Q. Did the hamsters have any differences with their respiratory system which you noted with respect

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to when you compared hamster respiratory systems to humans' respiratory systems?
A. Oh, yes.
COUNSEL: Object to form.
A. The hamster has a very tiny respiratory system, being a small animal, and humans have a rather wide approach to the lungs through the bronchi.
So, the hamster would never get the same relative amount of smoke into its lower respiratory tract that could be expected to enter the human lung.
Q. Did there come a time when you reported the results of your finding that you were able to produce cancer of the larynx in hamsters who were smoking to the tobacco industry?
COUNSEL: Objection, leading.
(Fast forwarding.)
Q. Doctor, my question is, I would like for you to tell the Court and the jury what happened when you attempted to publish the results of the study where you found that cancer of the larynx in hamsters who had been exposed to smoke.
A. Well, we wrote the paper and we saved the paper, for their approval, to Council for Tobacco Research and its then research director, Robert Hockett.

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17926

Q. And what happened once you sent the paper to Mr. Hockett?
A. And they objected to certain terms which we used in that paper.
Q. What did they object to, and how was that communicated to you?
(Fast forwarding.)
A. Well, there was a letter from Mr. Hoyt, who was then the director of Council for Tobacco Research, pointing out that we had not fulfilled our end of the contract which gave the tobacco council control of our data and know-how.
Q. And what happened after that?
A. After I responded to that letter, Mr. Hoyt suggested that Robert Hockett and a lawyer by the name of Ed Jacob should visit me and discuss this further.
Q. And did you ever have any discussions with Mr. Hockett and Mr. Jacob?
A. They came to my summer place in Maine in July or August of 1973 to discuss this matter.
Q. What happened when they came to see you in Maine?
A. They told me --
COUNSEL: Objection.
(Fast forwarding.)

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17927

Q. Please answer the question.
What happened when Dr. Hockett and Mr. Jacob came to see you in Maine?
A. They expressed their disapproval of certain terms we used; namely, cancer or microinvasive cancer. And they suggested that we should use only the term "pseudoepitheliomatous hyperplasia" and not ever the term "cancer."
Q. Did they say anything else to you?
A. I beg your pardon?
Q. Did they say anything else to you?
A. Mr. Jacob at one point of the discussion

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said, "You realize that if you were to publish this as you wish to do it, you would never get a penny from the Council for Tobacco Research."

Q. So you were threatened.

(Fast forwarding.)

Q. You can answer the question, Doctor. You were threatened, correct?

A. Yes.

(Fast forwarding.)

Q. What happened after the meeting in Maine when Mr. Hockett and Mr. Jacob came to see you?

(Fast forwarding.)

A. I can answer that very simply. I changed the

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paper to conform to their wishes and submitted it to them for approval.

Q. And was it approved?

A. Yes.

Q. And was it published?

A. It was published, but when the gallies came back to us, I changed it back to its original form, the way we wanted to see it published, and that's the way it was published.

Q. Why did you change it back to its original form?

A. Because I believed that the scientific evidence was clearly that cancer had been induced and, therefore, should not be masqueraded as a more benign situation.

Q. When you use the word "we" with respect to the word research that you did with respect to the hamsters and the cancer that they had of the larynx, who was involved in the research that were you doing?

A. It was Dr. Bernfeld, Dr. Russfield and Dr. Soto that did the scientific work with myself.

Q. Were there other physicians or pathologists who reviewed the slides that you were commenting upon in this paper which had cancer?

A. Yes.

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COUNSEL: Objection to the form.
Q. What were the others that had reviewed the slides?
A. I had forgotten some of the names, but there were at least six other pathologists who looked at this, including Dr. Newburn of MIT. And you have in your records that we gave you the name of some of the others.
(Fast forwarding.)
Q. Which refer to other doctors who reviewed the slides; is that correct?
(Fast forwarding.)
Q. Well, whatever, Doctor.
There were other physicians who reviewed these slides?
A. There were other physicians, other pathologists, experienced in this field, who saw these slides.
(Fast forwarding.)
A. They saw cancer in many of our slides, and in some of them they saw pre-cancerous lesions.
Q. Did you present the results of this study at any scientific meeting?
A. Yes.
Q. When did you do that?

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A. I did that in 1974 at Atlantic City at the meeting of the American Association of Pathological Societies.
Q. Did you have any press conferences with respect to the findings that you reported at the scientific meeting in Atlantic City?
A. I was supposed to have a press conference, but it did not take place.
Q. How did that happen?
(Fast forwarding.)
A. I found out much later in the course of my testimony at the Cipollone case that the public relations person working for the Council for Tobacco Research had made arrangements to cancel my press conference; and that explained why, when I went to the assigned room in Atlantic City for the press conference, there was no press conference.
Q. At the time that you went to the room for the press conference, why did you think that there was

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no
press conference?
A. I had no idea. I thought it was one of these
mix-ups that sometimes occur.
Q. Okay. Was it usual or a common occurrence
for you to give a press conference on papers?
A. Not from me personally. I had given one or

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17931
two, but for everybody who had anything new to report
at that meeting, there usually was a press conference.
Q. I'm going to show to you a memorandum which
is dated April 22nd, 1974, which I would like for you
to take a look at, and tell me if that is the memo that
you reviewed during the proceedings of the Cipollone
case which indicated to you what had happened to the
press conference.
A. Yes. Yes. That's it.
(Fast forwarding.)
Q. Now, you had other papers which were
published with respect to work that was funded by the
Council for Tobacco Research, other than this paper
which involved the hamsters, the inhalation studies --
A. Yes.
Q. -- where cancer of the larynx was produced?
A. Yes.
Q. But this particular paper was the first time
that anyone from the Council for Tobacco Research had
put any pressure on you or threatened you; is that
correct?
COUNSEL: Objection to the form.
Q. And is this the first time that you had ever
come up with results as damaging as this for the
Council for Tobacco Research?

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17932
COUNSEL: Objection.
A. Yes.
COUNSEL: That's all of the questions I have.
Thank you.
(The video was paused.)

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MR. ROSENBLATT: So the next question, Judge,
starts out cross examination.
THE COURT: By?
MR. ROSENBLATT: By Mr. Randles, who represents Philip Morris and Lorillard Tobacco companies.
MR. ROSS: It was taken in the other case.
He doesn't represent them in this case.
THE COURT: At the time.
MR. ROSS: At the time he did.
(The videotape was continued as follows:)
Q. Met previously. Just to remind you my name
is --
(Fast forwarding.)
Q. Your first grant from CTR was in about 1955,
wasn't it?
A. That would be about right.
Q. You were one of the very early grantees of
CTR, weren't you?
A. Yes.

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Q. And at all times up until about 1969, you had
research grants from CTR?
A. Yes.
Q. And at a later point, 1969 or 1970, you started working by way of contract with CTR, correct?
A. I think it was after 1970.
Q. All right. Now, in your grant work, you would submit grant proposals, and the Scientific Advisory Board of CTR would decide whether or not to
fund them; is that correct?
A. Yes.
Q. And the work that you had funded by CTR in
your grant work was important research, wasn't it?
A. I believe so.
Q. The work that you had funded by CTR all related to smoking and health, didn't it?
A. Yes.
Q. And all of the various grant proposals that
you presented and had funded by CTR had scientific merit, didn't they, Doctor?
A. Yes.
COUNSEL: Can I ask Dr. Homburger to speak up
a little bit? I'm having trouble hearing.
THE WITNESS: Yes.
Q. With your grant research, you were free to

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17934

conduct your research as you saw fit, right?
A. Right.
Q. And you were always free to report the results of your research as you thought appropriate, weren't you?
A. Right.
Q. And you could do with your data whatever you thought should be done, couldn't you?
A. Of course.
Q. You were free to publish the results of your grant research even when the results could be considered adverse to the tobacco industry, right?
A. Yes.
Q. And no one ever interfered with your freedom to conduct or report your grant research, did they?
COUNSEL: Objection to the form.
A. Not until later.
Q. Not your granted research I'm asking about.
A. No, not my grant research.
Q. Okay. Just so we're clear --
A. Yes.
Q. -- no one ever interfered with your freedom to conduct or report your research as you thought appropriate, didn't you?
A. Right.

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17935

(Fast forwarding.)
Q. During most of the time that you received grants from CTR, or all of the time you received grants from CTR, Dr. Clarence Cook Little was the scientific director, wasn't he?
A. Not all the time. He died in -- I don't remember the exact date, but during his tenure I received grants.
Q. And Dr. Little had an excellent reputation in the scientific community both for his ability as a scientist and for his scientific integrity, didn't he?
A. Yes.
Q. You called him a great man, didn't you?
A. Yes.
Q. And you believe he was a great scientist, don't you?
A. Yes.
Q. You also testified that Dr. Little told

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you
19 that as scientific director of CTR he could do whatever
20 he wanted to do, right?
21 A. Yes.
22 Q. Every member of the CTR Scientific Advisory
23 Board, with whom you were personally familiar, had an
24 excellent reputation in the scientific community,
25 didn't they?

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17936
1 A. Yes.
2 (Fast forwarding.)
3 Q. Now, Dr. Homburger, would it be fair to say
4 your memory of the events discussed in those documents
5 was more accurate at the time you authored the document
6 than it is now, many years later?
7 A. Oh, of course.
8 Q. All right.
9 (Fast forwarding.)
10 Q. Now, Dr. Homburger, you've testified that in
11 a meeting at your home in Maine, in July or August of
12 1973, Dr. Hockett insisted that you call the changes to
13 your hamsters' larynxes pseudoepitheliomatous
14 hyperplasia instead of cancer, right?
15 A. Right.
16 (Fast forwarding.)
17 Q. And you stated that you would never use that
18 phrase because it was a meaningless phrase, didn't you?
19 A. Correct.
20 Q. And that's your view; it's a meaningless
21 phrase, correct?
22 A. Correct.
23 Q. Now, Dr. Sheldon Sommers is a distinguished
24 pathologist, isn't he?
25 A. Yes.

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17937
1 Q. And he reviewed your slides and concluded
2 that your hamsters had not developed cancer, didn't he?
3 A. I don't know whether that was his conclusion,
4 no.
5 Q. Is that what he told you?
6 A. No.
7 Q. He didn't tell you that?

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A. No.
Q. Okay.
A. He argued about the terminology.
Q. And he argued you should use the term "pseudoepitheliomatous hyperplasia"; is that correct?
A. That's correct.
(Fast forwarding.)
Q. Doctor, you testified yesterday that you did not believe there was any way that Dr. Sommers' disagreement with you over whether your hamsters had cancer in the larynx was in good faith because he insisted you use the meaningless term, "pseudoepitheliomatous hyperplasia" in that JNCI manuscript, right?
A. Right.
COUNSEL: Objection to form.
Q. And that is your basis for believing that Dr. Sommers did not have a good faith scientific

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disagreement with you, right?
A. Right.
Q. And that's your only basis for believing that, correct?
A. No. It's a difference of opinion as to the value of the term "pseudoepitheliomatous hyperplasia."
Q. And you believe that no reasonable scientist would use that term, don't you?
A. Not for the description of what we saw in these slides.
Q. Well, you believe it's a vague and meaningless term in general, don't you?
A. I believe that, but that's a personal belief. There may be others besides Dr. Sommers who think that there is such a thing in certain situations.
Q. But you don't?
A. I don't.
Q. Is that the view of your colleague, Dr. Peter Bernfeld?
A. He's not a pathologist.
Q. Dr. Peter Bernfeld was your long-time coresearcher in your lab, wasn't he?
A. Yes.
Q. And he worked with you for years, right?
A. Yes.

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Q. And he designed most of your research,

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didn't
he?
A. Yes, a good deal.
Q. And he wrote most of your labs, at least the
first draft of the research reports?
A. Of the reports, yes.
Q. And then you would collaborate with him to
finalize this?
A. Yes.
Q. He was an excellent scientist, wasn't he?
A. Yes.
Q. And in your opinion he was a careful
scientist?
A. Oh, yes.
Q. And he wrote accurate scientific reports,
didn't he?
A. Yes.
(Fast forwarding.)
Q. Dr. Dontenwill was a scientist with a good
reputation in the scientific community, wasn't he?
A. Yes.
Q. Would it surprise you to know that he used
the phrase "pseudoepitheliomatous hyperplasia" in
describing some of the changes to the larynxes of his
hamsters?

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A. That wouldn't surprise me, and I think he has
every right to do so, if he believes it's meaningful.
(Fast forwarding.)
Q. Are you familiar with the Atlas of Tumor
Pathologist of the Armed Forces Institute of Pathology?
A. I know what it is, yes.
Q. Are you aware that one of the categories they
list for cellular changes is pseudoepitheliomatous?
A. That's probably the case. They believe it
meaningful. I believe it's not meaningful.
Q. But you don't believe they're acting in bad
faith or --
A. No.
Q. -- irresponsible in using the term?
A. No, but that's not judging an induced cancer
in an experimental animal.
Q. Well, that's interesting, because I wanted to
ask you about Dr. Dontenwill. He was

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experimenting
with smoke inhalation in hamsters, wasn't he?
A. Yes.
Q. That was the subject of this paper that you
went to listen and talk about?
A. Yes. He used the term. So let him use the
term. It doesn't mean anything to me.
Q. Do you recall Dr. Dontenwill stating, "As in

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human pathology, a differentiation of so-called pseudoepitheliomatous changes and to the onset of carcinomas in the larynx is very difficult."
COUNSEL: Objection to the form.
A. I don't recall that. That's ridiculous to expect me to recall a thing like that 20 years later.
Q. Is that a reasonable statement on his part; that it is difficult to differentiate between cancer of the larynx and pseudoepitheliomatous hyperplasia?
COUNSEL: Objection to the form.
A. How can I think that it's difficult or not difficult if I don't believe it means anything?
Q. In the next sentence he stated, "Anyone with long experience in this field and with the above-mentioned atlas or other literature on this subject in mice knows that the criterion for malignancy in the larynx is difficult to explain."
Do you agree with him, Doctor?
A. Yes. That's true.
COUNSEL: Objection to the form.
(Fast forwarding.)
Q. Actually, Dr. Bernfeld had used the term "pseudoepitheliomatous hyperplasia" in reports of research at your own labs for years, hadn't he?
A. Well, it's possible, but that would be simply

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that I overlooked this be, and he got it from Russfield or Soto or from one of the other pathologists that looked at these slides.
Q. Did you routinely review the reports that Dr. Bernfeld prepared?
A. Oh, yes.
(Fast forwarding.)
Q. Dr. Homburger, would it surprise you if I

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told you that I have located eight reports prepared by Dr. Bernfeld of research that was conducted in your lab where he uses the term "pseudoepitheliomatous hyperplasia"?

A. No, it wouldn't surprise me, just sloppy editing. Today I would take it out.

Q. So you're saying that you were sloppy in editing his reports?

A. Yes.

Q. For leaving that phrase in?

A. Yes. He had no way to know what it was all about. He just took the reports of the pathologists that were given him and put it in as part of his report. He was responsible for the scientific content of the biological point and chemical point, not for the pathology.

(Fast forwarding.)

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17943

Q. Dr. Homburger, I'd like to show you a draft report that you transmitted to Dr. Bob Hockett on May 14th of 1974.

I'd like to have that marked as Exhibit 3, please.

COUNSEL: I believe to make a record it was marked March the 14th.

COUNSEL: The letter says May 14th.

COUNSEL: I apologize.

Q. Do you remember this report, Doctor?

A. No, I don't remember these pages.

Q. But do you remember --

A. I remember.

Q. -- your lab generally preparing this report and you sent it to Bob Hockett?

A. Yes.

Q. And I'd like to call your attention to Page 6 of the report, toward the bottom of the page.

Is the --

A. Well, now, wait a minute here. Pseudoepitheliomatous hyperplasia is defined as proliferation of the squamous epithelium in which there was a downgrowth of cells into the dermis.

So, we redefined the term, and this is the way we used it. So, that doesn't mean that we believe

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17944

it's meaningful when not explained.
Q. Well, Doctor, I'm a little confused. Let's read on because don't you then go on to say in the next sentence, "Nuclear dysplasia and mitotic activity tended to be more intense than in simple hyperplasia,"
correct?
A. Where is that?
Q. Page 6, next sentence.
A. Oh, nuclear hyperplasia, yes.
Q. And as a matter of fact, on page -- if you would, please, look on Page 7, midway through that follow-over paragraph, doesn't your report say, "In advanced stages, pseudoepitheliomatous hyperplasia is exceedingly difficult to differentiate from early invasive carcinoma"?
A. Well.
Q. And that's a report from your lab authored by Dr. Bernfeld, yourself, and Dr. Russfield, right?
A. Yes.
Q. And in that report you state that pseudoepitheliomatous hyperplasia is very difficult to differentiate from invasive carcinoma, don't you?
A. We state that and in the sayings that we use, pseudoepitheliomatous hyperplasia here defined as proliferation of the squamous epithelium in which there

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17945

was a downgrowth of cells into the dermis, this is true.
Q. And it was true that you found it difficult to differentiate pseudoepitheliomatous hyperplasia from cancer?
A. Yes, that's true.
(Fast forwarding.)
Q. And, Doctor, Exhibit 4 is a letter from Dr. Hockett to you dated June 3rd, 1974, with comments on the paper, draft manuscript I've just shown you, correct?
A. Yes.
Q. And he states that, "A composite of the suggestions and comments received by CTR staff and consultants is as follows," and he lists a number of comments, doesn't he?
A. Yes.

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Q. And comment number 5 says, "Page 6, Line 18,"
and that's the portion we just read, correct?
A. Yes.
Q. The term pseudoepitheliomatous hyperplasia
was questioned as to it's appropriateness.
A. Right.
Q. Right. So you utilized the term "pseudoepitheliomatous hyperplasia" in a draft

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manuscript of a paper concerning your hamster work,
right?
A. Yes. I did because they requested me to do
it. This was after the meeting with Jacob and Hockett.
Q. And then on June 3rd, 1974, in Exhibit 4,
Dr. Hockett writes back to you and questions the
appropriateness of the use of the term, doesn't he?
A. Yeah, but it was their suggestion in the
first place.
Q. So your testimony is, it was their suggestion
in the first place that you use the term, but on June
3rd, 1974, they wrote comments back to you questioning
the propriety of using the term?
COUNSEL: Objection to the form.
A. Absolutely. Absolutely. It doesn't make
sense, but that's what happened.
Q. And you thanked Dr. Hockett for his comments
on that paper, didn't you?
A. I must have.
Q. Dr. Homburger, you earlier testified that
Dr. Bernfeld had used the phrase "pseudoepitheliomatous
hyperplasia" in manuscripts and that when they got by
you, that was sloppy editing, correct?
A. I would think so.
Q. As a matter of fact, Dr. Bernfeld had used

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that phrase long before you say there was a dispute
about using this phrase in 1973, hadn't he?
A. Probably.
Q. That would not surprise you, would it?
A. No.

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Q. And it wouldn't surprise you if had he used
that term repeatedly in draft reports and manuscripts
and you just missed it prior to 1973, correct?
COUNSEL: Objection to the form.
Q. I'm sorry. Did you answer?
A. Correct. Obviously, I wasn't as convinced
about this meaning or meaninglessness at that time than
I am now.
Q. So your views today are different concerning
the meaninglessness of the phrase
"pseudoepitheliomatous hyperplasia," than they were in
1973?
A. I would not use it now. I would call it will
pre-invasive carcinoma or something like that.
Q. But you did use it in the 1970s, didn't you?
A. I obviously let it go by, yes.
Q. And it didn't stick out in your mind, did it,
because you didn't pull it out any of these papers?
A. No. I wasn't particularly concerned until
they wanted us to call everything pseudoepitheliomatous

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hyperplasia and not call it cancer.
Q. Do you have any document or manuscripts where
anyone from CTR ever suggests you using the term
"pseudoepitheliomatous hyperplasia"?
A. I don't believe so.
COUNSEL: Objection to the form.
A. I think that was all in the discussion.
(Fast forwarding.)
Q. Now, contract work and granted work are
different methods for supporting scientific research;
isn't that true?
A. True.
Q. And contracts are a common method of
supporting scientific research, aren't they?
A. True.
Q. There are key differences between contract
and grant research, aren't there?
A. Yes.
Q. And they include such factors as the
contracting/funding agency having a higher degree of
control over the design of the research?
A. Right.
Q. And the contracting agency has some

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control
24 over the freedom of a contract recipient to publish;
25 isn't that correct?

17949

A. Right.
Q. And that's very common, isn't it?
A. Yes.
Q. And there's also a difference in the ownership of the results between contract --
A. Right.
Q. -- and grant, aren't there?
In other words, the contracting agency owns the results of the contract.
A. Right.
Q. And in a grant, the grant recipient owns the results; isn't that right?
A. Right.
Q. And as part of that, any information that can be patented coming out of a contract belongs to the contracting agency, doesn't it?
A. Yes.
COUNSEL: Objection to the form.
(Fast forwarding.)
Q. Now, Doctor, you testified that with respect to your publication to JNCI that you put in the phrase "pseudoepitheliomatous hyperplasia," in your drafts to CTR because you say they insisted on it, and you took them out in the published version; isn't that correct?
A. Yes.

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17950

Q. And that is your recollection of the events, correct?
A. Yes.
Q. And you remember taking that phrase out of your paper as clearly as you remember CTR asking you to put it in, don't you?
A. Yes, I think so.
Q. Doctor, I want to show you an article that you wrote.
I'd like to have this marked Exhibit 5.
And ask you if you recognize that article?
A. Yes.

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Q. And this is the article you were discussing
that you published in the Journal of the National Cancer Institute, correct?
A. Yes.
Q. And this is the article in which you said
that CTR insisted you put in the phrase "pseudoepitheliomatous," and you refused -- you put it
in the original draft, and then you took it out of the
publish version, correct?
A. Uh-huh. Yes.
(Fast forwarding.)
Q. And then you said, "Chronic inflammation in
view of the controls was associated with slight

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17951

epithelial thickening, but never with true hyperplasia,
pseudoepitheliomatous change, or papilloma formation,
correct?
A. Okay. So I wanted to be nice to the CTR and
left it in, in one place.
Q. So you did leave it in, in this article?
A. Must have.
COUNSEL: Object to the form.
(Fast forwarding.)
Q. Now, Dr. Homburger, you have testified that
CTR switched your research from a grant to a contract
because when you reported the results of your hamster
inhalation results to CTR, they wanted to control your
right to publish; isn't that right?
A. Yes.
COUNSEL: Objection to --
(Fast forwarding.)
Q. Just so we're clear, my question to you was,
was it Mr. Hoyt's idea or your idea that you switch
from grant to contract research?
A. No, not my idea.
Q. It wasn't your idea?
A. No.
Q. When was the first time you discussed this
idea with anyone at CTR of switching from grant to

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17952

contract research?
COUNSEL: Again, I object to this whole

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line
of questioning with respect to grant versus contract.
It's beyond the scope of the direct examination. It's
irrelevant and inadmissible.
A. I really don't know.
Q. Would it surprise you to learn that you first
mentioned the idea of whether your work with CTR should
be construed as a grant or a contract on October 1st,
1968?
A. That would be a surprise to me. I don't --
COUNSEL: Objection to form.
Q. Dr. Homburger, I'm going to mark -- hand you
what we'd like to mark Defense Exhibit 6.
(Fast forwarding.)
Q. And you are certainly free to review this
whole letter, Doctor, but I'm particularly interested
in calling your attention to Page 3, the last large
paragraph there.
Have you had a chance to review the document,
Dr. Homburger?
A. Yes. I'm taking my time.
Q. You are free to do so.
A. Well, I don't -- I don't think this was the
first discussion. I mean, I agreed with Hoyt that the

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contract might be a better form because it was more
expensive to do this long-term inhalation studies than
anything we had done before. But -- I -- I don't think
it was the first time we discussed that.
Q. Okay. Let me just make sure we're clear. We
are now discussing an October 1st, 1968 letter that you
sent to Mr. Hockett, Dr. Hockett, who is the associate
scientific director at CTR; correct?
A. Yes.
Q. And in this letter you, among other things,
you state, We discussed certain administrative aspects
of this contract. You point out that within CTR, this
contract was actually being handled as a grant.

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And then you go on for several reasons to explain why you think it would be better to handle this as a contract.

A. Yes. That's true.

Q. And one of the reasons was, as you were just saying, that this was going to be a very expensive project, and typically funding agencies spend more money on a contract than they do a grant; correct?

A. Right.

Q. And you wanted them to undertake a large-scale contract with you; didn't you?

A. Yeah.

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17954

(Fast forwarding.)

Q. As a matter of fact, Dr. Homburger, not only did you write suggesting to CTR on October 1st of 1968 that they enter into a contract with you, you actually prepared a draft contract, which you transmitted to CTR; didn't you?

A. I may have done that.

Q. I'd like to have this marked as Exhibit 8.

Dr. Homburger, I'd like to show you what has been marked as Defendants' Exhibit 8 and see if you can confirm that this is a letter that you sent to Dr. Vince Lisanti at the Council for Tobacco Research on December 23rd, 1969.

(Fast forwarding.)

Q. Dr. Homburger, is this document, as I described it to you, a December 23rd, 1969 letter from you to Vince Lisanti, at the Council for Tobacco Research --

A. Yes.

Q. -- stating, Enclosed is a draft of an agreement between the Council for Tobacco Research and Bio-Research Consultants for inhalation studies on Syrian hamsters?

A. Obviously it's true, yes.

(Fast forwarding.)

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17955

Q. Furthermore, you actually submitted this draft contract to your lawyer, who made the changes to it, and you sent those changes to CTR, didn't you?

A. I don't remember any of it.

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Q. I'd like to have this marked as Defendants' Exhibit 9.

And, Dr. Homburger, is this a letter from you to Dr. Lisanti at the Council for Tobacco Research dated January 6th, 1970, which the cover letter states, Enclosed are the comments recently received from our counsel regarding the contract form of CTR. We hope that his suggestions will be acceptable to your lawyers.

A. Yes.

(Fast forwarding.)

Q. Dr. Homburger, I'd like to call your attention to Page 2, point number 5, that your lawyer makes.

And he states, "We note that there is no language in your proposed draft with regard to the fact that the findings made by Consultants in the course of this study belong to the Council, C-O-U-N-C-I-L. You may wish to refer to the Council's proposed contract and give the Council the assurance with regard to this point."

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Is that what it says?

A. Yes.

Q. So your lawyer was pointing out to you in 1970, and you transmitted his comments to CTR, that they needed to make sure in their contract with you that they were clear they owned the results, right?

COUNSEL: Objection to the form.

A. Yes.

Q. Thank you.

(Fast forwarding.)

(The video was paused.)

THE COURT: Stop it, please.

Are we getting anywhere close to an appropriated point?

MR. HEIM: I think the tape might be almost finished.

How close are you to the end of the tape?

THE VIDEOGRAPHER: My estimate would probably be about 15 minutes left on this tape.

THE COURT: All right. We'll finish

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that
tape then before we take a break.
Okay. Are you all still awake?
JURORS: (Responded affirmatively.)
(The videotape was continued as
follows:)
Q. So Dr. Homburger, so we're clear, you

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17957
suggested at least as early as October 1968, that
you
perform hamster inhalation work by means of
contract
with CTR, didn't you?
A. Yes.
Q. And you prepared the contract, didn't
you?
A. Yes.
Q. And your lawyer suggested changes to the
contract, including CTR's ownership of the
findings,
and you forwarded those changes to CTR, didn't
you?
A. Yes.
Q. And you signed the contract and sent it
to
CTR on June 19th, 1970, didn't you?
A. Yes.
Q. But you didn't send CTR a report on the
results of your hamster inhalation work under this
contract until April 2, 1972, did you?
A. I don't know the date. You have it
here. --
Q. Could we see the exhibits, please?
I would like to refer you back to
Exhibit No.
6, doctor that we talked about earlier. That is
your
first report to CTR --
A. Yes.
Q. -- regarding the results of this
inhalation
work; isn't that correct?
A. Yes.

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17958
Q. So you had had a contract with CTR to do
this
work for nearly two years when you finally
submitted
the results to CTR, correct?
A. Yes.
Q. So the fact that your CTR funding for
the
animal inhalation -- hamster inhalation work was
no
longer a grant but became a contract on June 19th,
1970, had nothing to do with the results of the
inhalation work, because the work hadn't been done

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yet,
had it?
A. I don't understand.
Q. Let me try again.
The fact that you were doing this research by means of contract instead of a grant was not at all connected to the results of the work which had not even been done yet?
A. That's correct.
(Fast forwarding.)
Q. As a matter of fact, didn't you claim that the reason your hamsters didn't get lung cancer was because not enough lung -- not enough smoke got down to their lungs?
A. I explained it that way.
Q. And that's still your view, isn't it?
A. Yes.

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Q. You said most of the smoke stopped at the larynx, so the larynx got a much higher dose, right?
A. Yes. Yes.
Q. And the significant exposure dose is required to get cellular changes, isn't it?
A. Yes.
Q. As a matter of fact, you told me yesterday that you exposed your hamsters to the maximum dose possible of smoke, didn't you?
A. Yes.
Q. So, in other words, you exposed your hamsters to the most smoke that they could tolerate without essentially suffocating, correct?
COUNSEL: Objection to the form.
A. No, not quite correct. They wouldn't suffocate. They might lose weight. They might get impaired in their growth.
Q. But you exposed -- I'm sorry. I didn't mean to interrupt.
A. We exposed them to the extent that nothing happened to them outside of what happened in the respiratory tract.
Q. Exactly. You exposed them to as much as you possibly could without running the risk of killing them?

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17960

A. Not without ill effect, but not necessarily kill them.

Q. But having had bad things happen to them?

COUNSEL: Objection to the form.

Q. Correct?

A. Losing weight.

Q. Dr. Homburger -- let's go off the record for a minute and talk about schedule.

(Pause in video.)

THE COURT: Is that the end of it?

THE VIDEOGRAPHER: I think that's the end of it.

MR. HEIM: Yes.

THE COURT: Okay. I think it's a good time to take a break.

Well, let's make it a quarter of 2:00. 1:45, folks.

(The jury exited the courtroom.)

THE COURT: Could I get an idea of where in this transcript we are?

Have a seat, folks.

MR. MOODHE: Page 91 we pick up with.

THE COURT: As compared --

MR. ROSENBLATT: I thought we pick up at 93?

MR. MOODHE: I'm sorry. 93.

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17961

THE COURT: How many pages are we in the transcript?

MR. ROSENBLATT: 250, but there are some wide gaps with page after page.

THE COURT: Okay. I have taken your advice and I am reading Cahan. Okay.

MR. REID: Thank you.

MR. ROSS: And you're wishing you hadn't.

THE COURT: I'm up to 115, 118.

(Discussion off the record.)

(A lunch recess was taken at 12:30 p.m.)

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